IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 25, 2006 Session

DONALD EUGENE MITCHELL v. ANTHONY KECK, KAREY KECK, AND CARL CARRUBA, JR.

Direct Appeal from the Circuit Court for Blount County
No. E-19809 Hon. W. Dale Young, Circuit Judge

No. E2005-02381-COA-R3-CV - FILED JUNE 26, 2006

Plaintiff asked the Court to declare right of way over defendants' properties. The Trial Court refused. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

David T. Black, Maryville, Tennessee, for appellant.

Duncan V. Crawford, Maryville, Tennessee, for appellees.

OPINION

In this action, plaintiff asked the Trial Court to declare that plaintiff had a right to use rights of way referred to as Keck Cove Way and a 20 Foot Drive. After hearing the evidence, the Trial Court refused.

On December 28, 2001, plaintiff acquired by deed a parcel of land near Fort Loudon Lake in Blount County. The deed also conveyed a forty foot easement (the "40 Foot Drive") providing plaintiff land access to Bales Hollow Road. A prior deed in plaintiff's chain of title mentions another right of way providing his land with access to what is now Bales Hollow Road via a different route.

The language in the prior deed from J.R. Endsley to Harley Francis, of October 17,1960, states:

> J. Richard Endsley and wife, Gertrude H. Endsley do hereby grant to the parties of the second part a twenty (20) foot easement on the property that they own adjacent and North of the property herein conveyed for the purposes of a road right-of-way extending from Old Leepers Ferry Road and running parallel with the North line of the property herein conveyed to the top of the hill, which is identified as the road way that is now used by Dr. Louis A. Mulsand, then said easement at the top of the hill will turn due South along the crest of the hill to the property described herein . . . .

After plaintiff acquired the property, he asked defendant Keck to execute a grant of easement for the 20 Foot Drive. When Keck refused and blocked the southern end of the 20 Foot Drive with a large truck and placed a "No Trespassing" sign on the northern end, plaintiff brought this action on September 26, 2003, averring that he was entitled to access his land via the 20 Foot Drive.

On December 1, 2003, plaintiff obtained a Quitclaim Deed from Galen H. Endsley, Charles Keith Endsley, Joann E. Smith, Geraldine E. Groover, and Marian Frances Carruba (the "Endsley Heirs"). The Deed conveys any interest that the heirs of James Richard Endsley have in the land underlying the two disputed driveways. The Deed was recorded in Blount County Register of Deeds on December 2, 2003.

On June 14, 2004, Carl Carruba, Jr. filed a Motion to Intervene as a party Defendant. The motion averred that intervener is an owner of the fee simple interest in the land underlying the 20 Foot Drive. The motion further charged that the December Quitclaim Deed was a nullity because the Endsley Heirs had no interest in the 20 Foot Drive to convey. The Court added Carruba as a defendant.

After the Trial Court heard evidence, the Court entered a judgment, dismissed the plaintiff's Complaint and sustained defendants' Counter-Complaint.[1] The Court held that plaintiff had no right to use the driveways and that the December Deed was champertous and void. Plaintiff has appealed and raises these issues:

A. Whether the December Quitclaim Deed is void as champertous.

B. Whether the plaintiff has the right to access Fort Loudon Lake via Keck Cove Way.

C. Whether the plaintiff has the right to access Mustang Drive via the 20 Foot

[1]The Counter-Complaint said Carruba owned the underlying fee to the 20 Foot Drive by adverse possession and averred that plaintiff's quit claim deed was void.

Drive.

D. Whether the 20 Foot Drive and Keck Cove Way are public rights of way.

This case is reviewed *de novo* based upon the record of the proceedings below. *Keaton v. Hancock County Bd. of Educ.*, 119 S.W.3d 218, 222 (Tenn. Ct. App. 2003). We presume that the trial court's findings of fact are correct, unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The presumption of correctness, however, does not apply to the trial court's conclusions of law. *Keaton*, 119 S.W.3d at 222.

Plaintiff argues that James Richard Endsley never conveyed the fee underlying the disputed driveways, and that the Endsley Heirs conveyed the fee to the underlying driveways to him when they executed their Quitclaim Deed. Defendants argue that Keck adversely possessed the driveways at the time of this conveyance; therefore, the Quitclaim Deed is champertous and void.

On this issue, "No person shall agree to buy, or to bargain or sell any pretended right or title in lands or tenements, or any interest in such pretended right or title." Tenn. Code Ann. § 66-4-201 (2005).

> Any such agreement, bargain, sale, promise, covenant or grant shall be utterly void where the seller has not personally, or by the seller's agent or tenant, or the seller's ancestor, been in actual possession of the lands or tenements, or of the reversion or remainder, or taken the rents or profits for one (1) whole year next before the sale.

Tenn. Code Ann. § 66-4-202 (2005). Under these statutes, if one out of possession attempts to convey land which is adversely possessed by a third party, the conveyance is void. *Kincaid v. Meadows*, 40 Tenn. (3 Head) 188, 192, 1859 WL 3430, at *2 (1859); *Blair v. Gwosdof*, 329 S.W.2d 366, 368 (Tenn. Ct. App. 1959). Regardless of the validity of the conveyor's title to the land, such title becomes merely a pretended title, within the statute, when there is an attempt to convey it under such circumstances. *Kincaid*, 40 Tenn. (3 Head) at 192, 1859 WL 3430, at *2; *Blair*, 329 S.W.2d at 368. There is no required duration of adverse possession by the third party; all that is required is that the third party adversely possess the land at the time of the conveyance. *Kincaid*, at 192; *Blair*, at 368.

Adverse possession requires "an occupation of the property under a claim of right or title which is open, actual, continuous, exclusive, adverse and notorious." *Catlett v. Whaley*, 731 S.W.2d 544, 546 (Tenn. Ct. App. 1987). Mr. Keck's occupation was open and notorious. The use of a gate, no trespassing signs, and a large highly visible truck all made Keck's intention to restrict access to the driveways plain to the surrounding landowners. Keck's occupation was sufficiently notorious to motivate one Endsley Heir, Keith Endsley, to testify that the purpose of the December Quitclaim Deed was "To show . . . that [the 20 Foot Drive] was [Plaintiff's] and nobody had the right

to block that driveway. Keck's occupation of the driveways was also continuous both before and after the Endsley Heirs executed the Quitclaim Deed. We conclude the evidence preponderates that Keck adversely possessed both the 20 Foot Drive and Keck Cove Way at the time the Endsley Heirs executed the Quitclaim Deed, and under the statute the Quitclaim Deed is void. We affirm the Trial Court on this issue.[2]

Next, plaintiff argues that he has the right to access Fort Loudon Lake via an 18-foot-wide driveway known as Keck Cove Way. This right exists if there is an easement over Keck Cove Way that is appurtenant to the plaintiff's land. The plaintiff cannot claim an express grant of such an easement via the December Quitclaim Deed, and plaintiff does not claim an easement via express grant or reservation in his chain of title, as none of these deeds mention any such right.

Plaintiff does, however, claim such an easement by implication, and such easements do not arise from an express grant or by prescription. *Cellco Partnership v. Shelby County*, 172 S.W.3d 574, 589 (Tenn. Ct. App. 2005). Instead, it is inferred to exist because it is "'necessary for the beneficial use and enjoyment of the property conveyed.'" *Id.* (quoting *Adcock v. Adcock*, No. 01-A-01-9505-CH-00220, 1995 WL 675852, at *4 (Tenn. Ct. App. Nov.15, 1995)). "The law does not favor such easements, and the courts of this state have expressed a policy in favor of restricting the use of the doctrine." *Id.* The party seeking to establish the existence of an easement by implication must prove the following elements:

> "(1) A separation of the title; (2) Necessity that, before the separation takes place, the use which gives rise to the easement shall have been long established and obvious or manifest as to show that it was meant to be permanent; and (3) Necessity that the easement be essential to the beneficial enjoyment of the land granted or retained. Another essential is sometimes added to these--namely, that the servitude be continuous, as distinguished from temporary or occasional."

Id. (quoting *Johnson v. Headrick*, 237 S.W.2d 567, 570 (Tenn. Ct. App. 1948)).

Plaintiff has not met these requirements, because he did not prove that access to the Fort Loudon Lake via Keck Cove Way is essential to the beneficial enjoyment of his land. The plaintiff's deed and chain of title indicate that his land includes its own shore line along the lake; thus, his land already has significant and independent access to the lake. For the foregoing reasons,

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[2]Plaintiff argues that Tenn. Code Ann § 66-4-204, provides that naked adverse possession without color or assurance of title, will never render a deed champertous. This interpretation is incorrect. The statutory language upon which the plaintiff's interpretation rests (i.e., "which lands no person, at the time of such sale, holds adverse possession by deed, devise, or inheritance") refers only to lands conveyed by a nonresident of Tennessee. *Hardwick v. Heirs of Stephen Beard*, 57 Tenn. (10 Heiskell) 659, 665, 1873 WL 3726, at *4 (1873); *Whitson v. Johnson*, 123 S.W.2d 1104, 1108 (Tenn. Ct. App. 1937).

the Court will not recognize an easement appurtenant to the plaintiff's land as requested.

Plaintiff claims the right to use the 20 Foot Drive pursuant to an express grant in his chain of title, i.e., the October 1960 Warranty Deed. Defendants assert that plaintiff's predecessors abandoned this easement. As the parties asserting abandonment, the defendants must prove abandonment by clear and unequivocal evidence. *Hall v. Pippin*, 984 S.W.2d 617, 620 (Tenn. Ct. App. 1998); *Miller v. Street*, 663 S.W.2d 797, 798 (Tenn. Ct. App. 1983). They are required to present evidence of both an intent to abandon the easement and "external acts carrying that intention into effect." *Hall*, at 620; *see also Phy v. Hatfield*, 126 S.W. 105 (Tenn. 1910). Nonuse of the easement, without proof of an intent to abandon, is insufficient. *Boyd v. Hunt*, 52 S.W. 131 (Tenn. 1899).

The Trial Court found the easement over the 20 Foot Drive had been abandoned.

An easement over the 20 Foot Drive first became appurtenant to plaintiff's land in 1960 via a grant by the Endsley family. Plaintiff's early predecessors did not do any work to make the 20 Foot Drive accessible. This work was done by individuals who subsequently purchased land along the eastern and western sides of the 20 Foot Drive. In 1977, Carruba established his residence on land adjoining both Mustang Drive and the 20 Foot Drive, and at that time the 20 Foot Drive was "deserted" and overgrown with vegetation. In addition, a dirt bank extended along the edge of Mustang Drive such that the 20 Foot Drive was inaccessible by car. Carruba used a bulldozer to make the 20 Foot Drive accessible, but he only cleared half of it.

The other half of the 20 Foot Drive, leading to what is now the plaintiff's land, remained overgrown until after 1985. Carl Kirby, who owned land adjacent to the 20 Foot Drive from 1972 until 1985, testified that driving over the 20 Foot Drive required traveling over briers, underbrush, and high weeds. Cecil F. Perkins, whose father purchased Mr. Kirby's land in 1985, testified that he tried to use the 20 Foot Drive in 1985 to access a well on the property, but his vehicle could not "get back through the brush." He testified that after the first 50 feet or so, the 20 Foot Drive[3] was overgrown with mimosa bushes and cedar trees.

The evidence does not preponderate against the Trial Court's finding that plaintiff's predecessors failed "to maintain the easement in a condition permitting it to be used for access." *See, Hall*, at 620-21.

The evidence establishes that plaintiff's predecessors in title placed a permanent fence across the 20 Foot Drive and that the fence was in place from at least 1994 until early 2002. The evidence on this issue establishes that plaintiff's predecessors placed a "permanent obstruction across the easement". *See, Hall*, at 620-21. The evidence further establishes that plaintiff's predecessors developed an alternate means of access accessing the plaintiff's land, and that plaintiff's predecessors obtained an easement over the 40 Foot Drive, a driveway 40 feet in width

[3]The 20 Foot Drive is 20 feet wide and 561.7 feet long.

connecting the plaintiff's land to Bales Hollow Road. Subsequent conveyances of the land mention only the 40 Foot Drive as the means of access, without any mention of the 20 Foot Drive. Developing an alternate access in lieu of the 20 Foot Drive easement, is another factor indicating that the plaintiff's predecessors intended to abandon the 20 Foot Drive. *Id., Hall.*

The evidence establishes that plaintiff's predecessors failed to maintain the 20 Foot Drive such that it could be used for access, placed a permanent fence across the 20 Foot Drive, and developed the 40 Foot Drive as an alternative to the 20 Foot Drive. These factors establish that plaintiff's predecessors intended to abandon the easement over the 20 Foot Drive. Accordingly, the evidence does not preponderate against the Trial Court's finding that the easement was abandoned.

Finally, plaintiff argues that the 20 Foot Drive and Keck Cove Way are public rights of way, insisting that they are implicitly dedicated to public use, and as a member of the general public, he is entitled to use them.

A landowner may implicitly dedicate his land for use as a public road. *Town of Benton v. Peoples Bank of Polk County*, 904 S.W.2d 598, 602 (Tenn. Ct. App. 1995). "There can be no dedication of property to private individuals. Any dedication must be for the benefit of the public at large." *Bunns v. Walkem Development Co.*, 385 S.W.2d 917, 920 (Tenn. Ct. App. 1964). "To establish dedication by implication there must be proof of facts from which it positively and unequivocally appears that the owner intended to part permanently with his property and vest it in the public, and that there can be no other reasonable explanation of his conduct." *Lewisburg v. Emerson*, 5 Tenn. App. 127, 132, 1927 WL 2117, at *4 (Tenn. Ct. App. 1927); *see also Town of Benton*, 904 S.W.2d at 602. Factors indicative of an intent to dedicate are whether: (1) the landowner opened a road to public use, (2) acquiesced in the public's use of the road, (3) the public used the road for an extended period of time,[4] (4) the public's actual use is such that any denial or interruption of the use would materially affect public accommodation and private rights, and (5) the public maintains the road. *Cole v. Dych*, 535 S.W.2d 315, 319-20 (Tenn. 1976); *McCord v. Hays*, 302 S.W.2d 331, 333-35 (Tenn. 1957). In applying the foregoing standard, it is clear that the evidence preponderates against any intention to dedicate the 20 Foot Drive or Keck Cove Way to public use.

For the foregoing reasons, we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to plaintiff, Donald Eugene Mitchell.

HERSCHEL PICKENS FRANKS, P.J.

[4]"While dedication is not dependent on duration of the use, extended use is a circumstance tending to show an intent to dedicate." *Rogers v. Sain*, 679 S.W.2d 450, 453 (Tenn. Ct. App. 1984) (citing *Cole v. Dych*, 535 S.W.2d 315, 320 (Tenn. 1976)).